

Ronald Wilcox, Esq., 176601
1900 Alameda, Suite 530
San Jose, CA 95126
Tel: (408) 296-0400
Fax: (408) 296-0486

O. Randolph Bragg, *pro hac vice*
Horwitz, Horwitz & Associates
25 E Washington St., Ste 900
Chicago, IL 60602
(312)372-8822 telephone
(312)372-1673 Fax

ATTORNEYS FOR PLAINTIFF

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

LANCE GITTIN, On Behalf of
Himself and All Others Similarly
Situating,

Plaintiff,

vs.

KCI USA, INC.,

Defendant.

) CASE NO. **5:09-cv-05843-RS**
)
)
) **JOINT NOTICE AND MOTION**
) **FOR CLASS CERTIFICATION**
) **AND PRELIMINARY**
) **APPROVAL OF CLASS**
) **SETTLEMENT**
)
) Date: March 2, 2011
) Time: 1:30 p.m.
)

Hon. Richard Seeborg
Courtroom #3, 17th Floor
U.S. DISTRICT COURT
450 Golden Gate Ave.
San Francisco, CA 94102

PLEASE TAKE NOTICE THAT on March 2, 2011, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the above-entitled Court located at 450 Golden Gate Ave., San Francisco, CA, Courtroom #3, 17th Floor, the parties will move the court for Preliminary Approval of a Class Action Settlement, This motion will be based on the herein notice and motion, including the legal authorities cited, the supporting declaration, all documents related to the motion, all documents in the Court's file in this action, and any other items the Court deems appropriate.

Plaintiff Lance Gittin ("Mr. Gittin") by his attorneys Ronald Wilcox and O. Randolph Bragg and Defendant KCI USA, INC by its attorneys Donald E. Bradley and Walter J. R. Traver submit this Joint Motion for Preliminary Approval of Class Action Settlement and state as follows:

1. In their class action complaint ("Litigation"), Plaintiff asserted claims pursuant to the Rosenthal Fair Debt Collection Practices Act, Cal. Civil Code 1788 *et seq.* ("RFDCPA") in connection with letters sent by KCI to Plaintiff and California residents regarding accounts owned by KCI USA ("KCI").

2. KCI denies liability to Plaintiff and the class for the claims alleged in the Complaint, but to avoid the cost of continuing litigation, considers it desirable that the action and the claims alleged herein be settled, upon the terms and

conditions set forth in the Class Settlement Agreement (“Agreement”) executed by the parties, attached hereto as Exhibit A.

3. For settlement purposes only, the parties have stipulated to and move the Court for certification of a class defined as (a) all persons with addresses in California, (b) who were sent letters from Defendant in the form of Exhibit 1 to the Plaintiff’s complaint, (c) regarding an alleged obligation incurred for personal, family, or household purposes, (d) during the one year prior to filing of Plaintiff’s complaint, *i.e.* – December 14, 2008 through December 14, 2009, (e) which letter was not returned by U.S. Post Office as undeliverable, and (f) who did not have civil court proceedings initiated against them by Defendant. The class contains 1655 persons.

4. Counsel for Mr. Gittin and KCI have reviewed and analyzed the legal and factual issues presented in this Litigation, the risks and expense involved in pursuing the Litigation to conclusion, the likelihood of recovering damages in excess of those obtained through this settlement, the protracted nature of the Litigation and the likelihood, costs and possible outcomes of one or more procedural and substantive appeals. Based upon their review and analysis, and after written discovery and arms-length negotiations (which included two full-day mediation sessions with Jonathan Schmidt as mediator), Mr. Gittin and KCI have entered into the Class Settlement Agreement, attached hereto as Exhibit A.

5. Pursuant to the Agreement, the parties have agreed to the following terms of settlement:

a. KCI shall pay \$4,000.00 to Mr. Gittin for statutory damages under the RFDCPA and for his services as class representative.

b. KCI shall pay the class a total of \$142,500.00 to be divided equally among its members as their RFDCPA statutory damages, approximately \$86.10 each.

c. Any undistributed funds will be awarded as a cy pres remedy for consumer representation and education to the Santa Clara University Alexander Community Law Center.

d. Defendant shall bear the cost of class notice and administration, which shall be performed by third party processor Simpluris Inc., 3176 Pullman St. # 123, Costa Mesa, CA.

e. Except as otherwise provided in this motion, within 20 days of the Effective Date as defined in the settlement agreement, KCI shall make all payments set forth in this Agreement, with the exception of the payment of uncashed or unclaimed funds which shall be paid to the Santa Clara University Alexander Community Law Center as described in Paragraph 10(c) of the Class Settlement Agreement. Payments to class members shall be made by check,

payable to each class member, delivered by first class mail to the addresses indicated in KCI's records.

g. KCI shall pay Plaintiff's counsel costs, expenses and reasonable attorneys' fees, subject to Court approval, as provided in Civil Code Section 1788.30(c), which provides:

"Reasonable attorney's fees, which shall be based on time necessarily expended to enforce the liability, shall be awarded to a prevailing debtor."

Plaintiff and KCI shall make good faith efforts to negotiate Plaintiff's claim to attorney fees. In the event the negotiations are unsuccessful, Plaintiff's counsel will make application to the Court within fourteen (14) days of entry of the Final Order by the Court pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. Payment to Plaintiffs' counsel is separate from and will not be taken from any part of the payments to the class members.

6. **Class Notice.** As directed by the Court, Counsel will cause notice to be provided to the Class by first class U.S. mail. Counsel shall, within 30 days of entry of its Preliminary Approval Order, cause notice, as approved by the Court (the form of the proposed Notice is attached hereto as Exhibit B), to be sent to the last known email addresses of the class members, according to KCI's records. In the event that a notice is returned or is undeliverable Counsel shall use reasonable

efforts to locate an alternative address for such class members and transmit notice to such alternative addresses, if any, located by Counsel.

7. KCI will bear the costs and expenses of notice and settlement administration.

8. Class members shall be allowed 30 days to opt out or object to the proposed settlement. In the event more than fifty (50) class members opt out of the Settlement Agreement, KCI shall have the right to rescind the Agreement, and the Litigation shall be restored to its pre-settlement status.

9. Mr. Gittin and his counsel believe that the settlement of this action on the terms and conditions set forth in the Agreement is fair, reasonable and adequate, and would be in the best interest of the class members.

WHEREFORE, Mr. Gittin and KCI respectfully request that this Court enter a Preliminary Approval Order (a proposed form of the order is attached hereto as Exhibit C) which (i) certifies the class as requested by the parties pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3); (ii) grants preliminary approval of the proposed settlement; and (iii) directs the mailing of notice in the form of Exhibit B hereto, subject to any modification deemed necessary by the Court; (iv) appoints Mr. Gittin as class representative and Ronald Wilcox and O. Randolph Bragg as class counsel and (v) sets dates for entry of appearances, opt-

outs, objections and a hearing for final approval, (a draft of the proposed final approval order is attached hereto as Exhibit D).

/s/Ronald Wilcox _____
Ron Wilcox
1900 The Alameda, Ste 530
San Jose, CA 95126
(408) 296-0400
ronaldwilcox@post.harvard.edu

and

/s/O. Rand Bragg _____
O. Randolph Bragg
Horwitz, Horwitz & Associates
25 E. Washington Street
Suite 900
Chicago, IL 60602
(312) 372-8822
rand@horwitzlaw.com

Counsel for Mr. Gittin and the proposed Class:

/s/Donald Bradley _____
Walter J. R. Traver
Donald E. Bradley
Musick, Peeler & Garrett LLP
100 Montgomery Street, Ste 2525
San Francisco, CA 94104-4303
(415) 281-2000
w.traver@mpglaw.com
d.bradley@mpglaw.com

Counsel for KCI USA